GRUBBS V. NATIONAL LIFE MATURITY INSURANCE COMPANY, AND SAME V. UNION CENTRAL LIFE INSURANCE COMPANY.*

Supreme Court of Appeals: At Wytheville.

June 17, 1897.

1. PLEADING—*Declaration on a simple contract—Defense that contract is sealed—Oyer—Demurrer.* Whether a paper declared on as a simple contract is a sealed contract or not cannot be raised by demurrer, but is a matter of fact to be presented at the hearing by proper plea or motion. It cannot be raised by craving oyer and demurring. As a general rule the right to crave oyer of papers mentioned in a pleading applies only to deeds and to letters of probate and administration, and only to deeds when the party pleading relies upon the direct and intrinsic operation of the deed.
2. CORPORATIONS—*Seal—Evidence of seal.* The mere presence of what purports to be the seal of a corporation impressed upon a contract which is valid and binding without the seal, unaccompanied by evidence that the officers of the company intended to, or did, affix it, is not sufficient to change the apparent character of the contract. It must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties that it should be a sealed instrument.
3. MOTIONS TO RECOVER MONEY—*Insurance policy—Notice.* A motion may be maintained under sec. 3211 of the Code for a judgment for money on an insurance policy, and the notice takes the place of both the writ and declaration.

Error to judgments of the Circuit Court of the city of Richmond, rendered December 3, 1894, in two actions of *Assumpsit,* wherein the plaintiff in error was the plaintiff, and the defendants in error were severally defendant.

The opinion states the case.

Pollard & Sands and *D. C. Richardson,* for the plaintiff in error.

Christian & Christian, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

These cases are before us upon writs of error to a judgment of the Circuit Court of Richmond City. The action in each case is *assumpsit* upon a policy of insurance issued to William A. Grubbs, now deceased, and the defendant craved oyer of the policy sued on and demurred to the declaration, in which demurrer the plaintiff joined.

* Reported by M. P. Burks, State Reporter.

The Circuit Court sustained the demurrer and dismissed each suit, on the ground that the policies are sealed instruments upon which an action of *assumpsit* will not lie.

At the lower left-hand corner of the policy in the first-named case there is impressed the following words: "*The National Life Maturity Ins. Co., began business May 16, 1883 (Seal);*" and upon the policy in the other, in the same position, the words: "*Union Central Life Insurance Company, Cincinnati, Ohio (Seal).*" Above the impression, in the first case, the policy is signed on the right-hand side, "H. Browning, President," and on the left, "Geo. E. Eldridge, Secretary, by L. E. Albert;" and in the other case the policy is signed on the right, "R. S. Rust, Vice-President," and on the left, "E. P. Marshall, Secretary." Each policy concludes: "In witness whereof, etc. (the company) has, by its President and Secretary, signed and delivered this contract," etc. There is nothing contained in either policy to indicate that the seal of the company was affixed or authorized to be affixed thereto by the officers signing for the company.

The declarations do not allege in terms, or in effect, that the policies were sealed instruments, but they are declared on as simple promises to pay to the beneficiary, upon the death of the person to whom issued, or to him at a prior period of maturity, a specified sum of money, and alleging the death of the insured, the fulfillment of the conditions of the policy, etc.

As a general rule, the right to crave oyer of papers mentioned in a pleading, applies only to deeds and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed. *Langhorne* v. *Richmond R. Co., &c.*, 91 Va. 369. But if it be conceded that the defendants had the right to crave oyer of the policy sued on, the question whether or not it is a sealed instrument, intended and issued by the Company as such, since it is not averred in the declaration that it is a sealed instrument, is one of fact to be presented at the hearing by proper motion or plea, but not by a demurrer to the declaration.

"It is now a rule well settled throughout the United States, that a corporation may make a contract without the use of a seal, in all cases in which this may be done by an individual." 1 Morawetz on Pr. Cors., sec. 338. It is not infrequently the case that contracts of insurance are made and issued without the seal of the company issuing them being affixed thereto. The appearance of an impression upon

a contract, as in these cases, is not always to be taken as changing the instrument from a simple contract to a specialty. In the case of *Weeks* v. *Esler*, 68 Hun. 518, the Supreme Court of New York held: "Before an instrument in the form of a promissory note, made by a corporation, with what purports to be the seal of the corporation impressed thereon, but containing no words indicating an intention to execute it as an instrument under seal, can be held to be a specialty and not a negotiable promissory note, it must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties to the instrument that it should be an instrument under seal and not negotiable." This decision was affirmed by the Court of Appeals of New York, 143 N. Y. 374, and in the opinion by Gray, J., it is said: "Assuming that the presence of the corporate seal upon such an instrument or note, could affect its negotiability—a proposition as to which we entertain grave doubts, but which we do not feel called upon now to determine—we think that its mere presence, unaccompanied by a single fact evidencing that the Company's officers intended to, or did, affix it, was quite insufficient to have any effect upon its apparent character." . . . . . "Whatever is claimed for the presumption which attaches ordinarily to seals of corporations, when appearing to be affixed to deeds or other instruments, in such a case as this it would be unreasonable to hold that any presumption existed."

To the same effect are the cases of *Jackson &c.* v. *Myers Bros.*, 43 Md. 452, and *Metropolitan L. Ins. Co.* v. *Anderson*, 79 Md. 375. See also 21 Amer. & Eng. Enc. L. 912, note; *Burks T. Co.* v. *Myers*, 9 Amer. Dec., 402; and *Koekler* v. *Black River F. I. Co.*, 2 Black, 716. The view taken by the court in all those cases is, that the mere presence of what purports to be the seal of a corporation impressed upon a contract that would be a valid and binding contract though not under seal, unaccompanied by evidence that the Company's officers intended to, or did, affix it, is insufficient to have any effect upon its apparent character. In other words, it must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties to the instrument that it should be an instrument under seal; all of which are matters of proof.

We are therefore of opinion that the demurrer in each of the cases before us should have been overruled and the cases proceeded in to a trial upon their merits.

As the cases have to go back to the court below to be further pro-

ceeded in, we deem it inexpedient to consider the other questions presented and argued here. It may be said, however, that sec. 3272 of the Code has no application to these cases, nor has sec. 3251, but the latter operates to repeal the Act of 1871–2, p. 58, which provided that "no particular form of declaration shall be necessary in an action on a policy of insurance," &c., and the Act of March 3, 1896—Acts 1895–6, p. 707, amending sec. 3251 of the Code and restoring the Act of 1871–2, *supra*, having been enacted since the institution of these suits, it can have no bearing whatever upon them.

A motion may be maintained, under sec. 3211 of the Code, for judgment for money due on an insurance policy, and the notice of the motion takes the place of both the writ and the declaration. *Morotock Ins. Co.* v. *Pankey*, 91 Va. 259 ; but when the plaintiff elects to bring a different form of action the declaration filed must conform to the rules governing in the form of action adopted.

The judgment of the Circuit Court in each of these cases must be reversed and annulled and the causes remanded for further proceedings therein in accordance with this opinion. *Reversed.*

SEALS.

NOTE.—At common law the question of seal or no seal was a question to be determined by simple inspection. It was an appeal to the senses. Hence it was a question to be determined by the court. But whether the seal was *the* seal of the alleged obligor who denied it by proper plea was a question to be determined by the jury on proper evidence. Long before we had any statute on the subject, however, scrolls were substituted for wax, and the question frequently arose whether these scrolls, affixed as seals, proved themselves as did the impressions on wax, and if not what proof was required that the scrolls were affixed as seals. It was settled that they did not, and that there must be some recognition of the scroll in the body of the instrument in order to show that it was affixed as a seal, except in that class of cases where the writing could only be effectual when sealed. It was further determined that the word *seal* written within the scroll did not furnish the necessary proof. *Cromwell* v. *Tate*, 7 Leigh, 301 ; *Clegg* v. *Lemessurier*, 15 Gratt. 108 and authorities cited in those cases. Our first statute on the subject was introduced at the revisal of 1849. It was then enacted that "any writing to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed." Code 1849, ch. 143, sec. 2. To this section the revisers affixed a note, saying, "the rule prescribed by this section will apply in a case in which a contract is made not under a statute directing it to be sealed, but under the common law." Report of Revisers, p. 716. This statute seems to have been merely declaratory of the existing law. At the same revisal it was enacted : "In cases in which the seal of any court or public office shall be required to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal made upon the paper

alone, as well as an impression made by means of a wafer, or of wax affixed thereto. And in any case in which the seal of any natural person shall be required to appear, it shall be sufficient for such person to affix to such paper a scroll by way of a seal." Code 1849, ch. 16, sec. 17, clause 12.

In a note to this section by the revisers it is said: "It is incident to every corporation to have a common or corporate seal. It may make or use what seal it will. Angell & Ames on Corporations 151." Report of Revisers, page 74. It would seem probable from this that the revisers deemed it unnecessary to make a provision for private corporations similar to that for "any natural person."

We believe these two sections remained unchanged until the revisal of 1887. At that time the word "corporation" was inserted in the first line of clause twelve above mentioned, immediately before the word court, so as to make the line read "in cases in which the seal of any *corporation*, court or public office," &c. Code 1887, sec. 4, clause 12. And then to make the law homogeneous the revisers added to sec. 2, chap. 143 (Code of 1849) the following words: "The impression of a corporate or an official seal on paper or parchment alone shall be as valid as if made on wax or other adhesive substance." Sec. 2841 (Code 1887). It is doubtful if these changes were intended to do more than declare the law as it then existed. It is worthy of observation, however, that nowhere does the statute declare that the scroll of a corporation affixed by way of a seal shall have the effect of a seal. This is declared as to natural persons, but not as to corporations. In each instance it is simply declared that the "*impression*" may be made on paper instead of wax, but it seems to be assumed that there must be an *impression*—not a mere stamp or scroll. Whether such stamp, or scroll, is sufficient has not been raised or decided in Virginia so far as we have observed.

In that very excellent treatise of Professor Lile of the University, "Notes to Minor's Institutes, Vol. 1, and on Corporations," it is said at page 178, "the courts are divided as to whether a printed impression (common in insurance policies) may constitute a corporate seal. The better doctrine seems to be that it does not." He cites *Mitchell* v. *Union &c. Ins. Co.* (Me.) 71 Am. Dec. 529 and note; *Bates* v. *Boston, etc. R. Co.*, 10 Allen 251; Note to *Agricultural Bank* v. *Rice*, 4 How. 224 in Lawy. Co-op. Ed. U. S. Reports; *Pierce* v. *Indseth*, 106 U. S. 546.

In 4 Thomp. Corp., sec. 5104, it is said that "a corporation may adopt the seal of another, or even an ink impression." But see a full discussion of the subject of what will or will not suffice as a seal in secs. 5070 and 5071 of 4 Thomp. Corp. We can see no good reason why a private corporation should stand on any different footing in this particular from natural persons, and as the latter were allowed, without the aid of a statute, to use a scroll by way of seal, it would seem that the same privilege should be extended to private corporations. In the principal case it is said that the seal was "impressed" on the paper. The record does not disclose just what this means, but we infer that an impression was made on the texture of the paper by a metallic seal. If this had been on wax it would, we presume, have been a good common law seal, and the question of seal or no seal would have been a question of ocular demonstration, and would have needed no recognition in the body of the instrument. The fact that it was on paper instead of wax would seem to make no difference. The impression of the corporate seal thereon made it a seal. *Pillow* v. *Roberts*, 13 How. 472. In the principal case the court was of opinion that the question whether the instrument was sealed or

not never came before the court. The declaration declared on a simple contract, and it could not be known in advance what paper would be offered in evidence in support of that declaration, and hence the demurrer did not raise the question.

The declaration, however, following the provisions of sec. 3251 of the Code filed the original policy with it. The language of the declaration is that the policy "is filed herewith." Did not this make the policy a part of the declaration? If so, then notwithstanding the declaration averred a simple contract, the contract itself when presented as a part of the declaration appears to be a sealed instrument. But there is nothing anywhere, either in the declaration or the policy which recognizes any seal, or avers or shows that any one had authority to affix the corporate seal to the policy. And the court says that "the mere presence of what purports to be the seal of a corporation impressed upon a contract that would be a valid and binding contract though not under seal, unaccompanied by evidence that the company's officers intended to, or did, affix it, is insufficient to have any effect upon its apparent character. In other words, it must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties to the instrument that it should be an instrument under seal; all of which are matters *of proof*."

In *Dinwiddie Co.* v. *Stuart, &c.*, 28 Gratt. 526, 530–'1, Christian, J., seems to have assumed that it is necessary to acknowledge a corporate seal in the body of the instrument, though in that case it was held to have been sufficiently done by designating the instrument as "a bond" on its face.

In "Lile's Notes on Corporations," p. 180, discussing this subject, it is said: "But it seems to be well settled that no such acknowledgment is necessary, and that the question of seal or no seal is to be proved by an inspection of the instrument, as in case of private seals at common law. See . . . . an interesting article on the subject in 26 Am. Law Review, 120." For a full discussion of the subject of corporate seals, their use, proof, &c., see an elaborate note in 50 Am. St. Rep. 150.

The proper method of raising the question whether the instrument was sealed or not, when it had been declared on as a simple contract, is plainly indicated by the opinion in the principal case. The most natural way would have been by objection to the introduction in evidence of a sealed contract to support a cause of action on a simple contract, but, doubtless, it might also have been raised by a plea setting forth the facts.

M. P. BURKS.

KEESEE v. MELVIN AND OTHERS, ELECTION COMMISSIONERS OF HALIFAX COUNTY.*

Supreme Court of Appeals: At Richmond.

November 21, 1895.

1. ELECTION VALID THOUGH HELD AND CERTIFIED BY ONLY TWO JUDGES.—*Mandamus.* An election held and certified by only two judges of election is

*The statement of this case is furnished by a member of the Richmond bar, with a request for its publication.